APPENDIX

Rule 29(1), Rules of the Supreme Court of the State of Oklahoma, Title 15, Okla. Stats. Ann., Ch. 15 App., Rule 29(1)

APPLICATION FOR SECOND PETITION FOR REHEARING: (1) Within five (5) days after a petition for rehearing is denied an application for a second petition for rehearing may be made but not filed except by leave of Court. Such application shall have attached thereto a petition for rehearing and a brief in support thereof.

Rule 33(1), Rules of the Supreme Court of the State of Oklahoma, Title 15, Okla. Stats. Ann., Ch. 15 App., Rule 33(1)

MANDATE AND ISSUANCE: (1) After the expiration of fifteen (15) days from the filing of an opinion proper mandate to the trial court may issue; provided, that when a petition for rehearing is filed within the time prescribed, or by leave of Court, no mandate shall issue until such petition for rehearing shall have been determined; and if the petition for rehearing is denied, the mandate shall not be issued and transmitted until the expiration of five (5) days from the date of the order denying the petition for rehearing so as to permit either party to make application for second petition for rehearing. If such application is made the mandate shall not issue until the application is disposed of.

36 Okla. Stats. 1951, Sec. 213

"Sec. 213. *Statements in Application Deemed Representations and Not Warranties—Exceptions—Application Not Part of Policy Unless Attached.* In any claim arising under a policy which has been issued in this State by any life insurance company, without previous medical examination or without the knowledge and consent of the insured, or in case said insured is a minor, without the consent of the parent, guardian, or other person having legal custody of said minor, the statements made in the application shall, in the absence of fraud, be deemed representations and not warranties: Provided, however, that the company shall not be debarred from proving as a defense to such claim that said statements are wilfully false, fraudulent or misleading. • • • "

36 Okla. Stats. 1951, Sec. 820

"The falsity of any statement in the application for any policy covered by this act shall not bar the right to recover thereunder unless such false statement *was made with actual intent to deceive and unless it* materially affected either the acceptance of the risk or the hazard assumed by the insurer."

36 Okla. Stats. 1957, Sec. 4407(c); formerly 36 Okla. Stats. 1955, Sec. 833.5

"The falsity of any statement in the application for any policy covered by this article may not bar the right to recover thereunder unless such false statement materially affected either acceptance of the risk or the hazard assumed by the insurer."

28 U.S.C. § 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 2101(c)

* * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Portion of Record Necessary to Show Proper and Timely Raising of Federal Question: Paragraph Numbered 5, Petitioner's Second Petition for Rehearing, Filed in the Court Below, October 11, 1960

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 38,731

ALLIED RESERVE LIFE INSURANCE COMPANY, a corporation, *Plaintiff in Error,*

v.

HUBERT MORGAN CRAGG, JR., a minor by and through HUBERT MORGAN CRAGG, his Father and Next Friend, *Defendant in Error.*

* * *

5. That the opinion rendered herein, as corrected by order of this Court on September 19, 1960, constitutes a violation of the Constitution of the United States and a denial of due process of law under the Fourteenth Amendment thereto, as follows:

(a) That an Appellate Court in order to satisfy the requirements of due process of law must construe and apply *all* statutory provisions applicable to the controversy and cannot rely upon only a part and disregard the remainder where all such statutes have been called to the attention of the Court in the Briefs of the parties.

Opinion and Judgment of the Supreme Court of the State of Oklahoma, June 21, 1960. (Deleted words in brackets; inserted word underlined.)

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 38,731

ALLIED RESERVE LIFE INSURANCE COMPANY, a corporation, *Plaintiff in Error,*

v.

HUBERT MORGAN CRAGG, JR., a minor by and through HUBERT MORGAN CRAGG, his Father and Next Friend, *Defendant in Error.*

SYLLABUS

1. The existing statutes and the settled case-law of this state at the time a contract (policy or insurance) is made (issued) become a part of such contract (or policy) and must be read into such contract or policy.

2. Under Sections 213 and 820, 36 O. S. 1951, to avoid a policy for misrepresentation, the false statement must have been made wilfully and with intent to deceive, and must have been relied on by the insurer.

3. Record examined and held, that the instructions as a whole fairly submitted the issues of law and fact to the jury, and that the verdict and judgment based thereon is reasonably sustained by the evidence and is not contrary to law.

APPEAL FROM THE COURT OF COMMON PLEAS OF TULSA COUNTY, OKLAHOMA

Hon. Paul A. Walker, Judge

Action to recover medical, surgical and hospital expenses under insurance policies. Judgment for plaintiff. Defendant appeals.

AFFIRMED

Abernathy & Abernathy, Charles C. Baker,
Shawnee, Oklahoma.
For Plaintiff in Error.

John A. Ladner, Jr., Fred Woodson,
Tulsa, Oklahoma.
For Defendant in Error.

JOHNSON, J.:

This action was brought in the Court of Common Pleas of Tulsa County, Oklahoma, by Hubert Morgan Cragg, Jr., a minor, through Hubert Morgan Cragg, Sr., his father and next friend, against Allied Reserve Life Insurance Company of Oklahoma City, Oklahoma, to recover certain medical, surgical and hospital benefits under two policies of insurance issued by the defendant to the plaintiff on November 1, 1956, bearing policy number S-O-42-67. Plaintiff asked for $2,599.00 but reduced that sum by stipulation to $1,216.50. This was the amount of expenses allegedly accrued as a result of confinement at Hillcrest Medical Center in Tulsa, Oklahoma, which expenses arose out of an alleged accidental injury sustained by plaintiff on or about December 12, 1956. A jury trial resulted in a verdict and judgment in favor of plaintiff in the amount of $1,216.50, with eleven jurors concurring in the verdict.

Motion for a new trial was overruled, and exceptions allowed, resulting in this appeal.

For reversal the defendant's sole contention is that the trial court committed error in refusing to give its requested instruction no. 9 and in giving instruction no. 6.

The defendant argues that instruction no. 6 erroneously instructed the jury that misrepresentations, omissions, or concealment of facts by plaintiff on his written application would not defeat recovery on the policies unless such statements were fraudulent, especially since defendant (did not raise and) was not relying on the defense of fraud, but in line with its pleaded defense it was relying upon Secs. 3609 and 4407(c), Oklahoma Insurance Code, Title 36, O. S. 1951, as they appear in the Laws of 1957, page 365. That is, the sole defense alleged and proved was that the misrepresentations and concealments of fact by plaintiff on his written applications were material to the acceptance of the risk and hazard assumed, and that the company would not have issued the policies had the true health history of the plaintiff been disclosed on the written applications.

The plaintiff's counter proposition is that the trial court did not commit error in refusing to give the jury defendant's requested instruction no. 9, and that instruction no. 6 given by the trial court correctly and fairly presented the law of the case under the evidence.

Plaintiff concedes that under the general rule it was the duty of the trial court to submit by appropriate instructions the theory of the defense in accordance with the law and evidence where the evidence tends to support the same. Western States Grocery Co. v. Mirt, 190 Okl. 299, 123 P. 2d 286. But plaintiff points to the facts in this case and the law governing the contracts of insurance as they existed at the time the insurance policies were issued, and asserts that by reason thereof the court's instruction no. 6 was a correct statement of the law as (then) applied to the facts.

The record discloses that the applications for insurance policies were made on October 30, 1956, and that the policies became effective and were issued on November 1, 1956; that the defendant breached the conditions of the policies by refusing to pay plaintiff's medical expenses during December, 1956 and January, 1957.

Defendant's appeal presents the single question of whether the intent to deceive by the insured plaintiff is a necessary element of defendant's defense. The statutes in force and effect and the case law existing in November, 1956, when the insurance policies were issued, determine and control that question. Oklahoma Cotton Growers' Ass'n. v. Salyer, 114 Okl. 77, 243 P. 232. Therein in the first paragraph of the syllabus this Court said:

> "The existing statutes and the settled law of the land at the time a contract is made become a part of it, and must be read into it.
>
> "All contracts are formed to be construed in the light of the rules and principles of law applicable to the subject-matter of the transaction, and those rules and principles control the rights of the parties; the laws upon the subject of a contract are read into it and become a part thereof to the same extent as though they were written into its terms.
>
> "Where parties enter into a contract by virtue of authority derived from a certain act, and, in view of such rights as are created, defined and conferred by such act, it is elemental that the rights of the parties must be construed by the provisions of the act.
>
> "Where a contract is entered into under such provisions and conditions, and such contract is alleged to have been breached while such act is still in force, then, if any provision or terms contained in such contract, in violation of rights conferred by such act, which are remedied by a subsequent act, such subse-

quent act is void as to such provisions, and violative of section 15, art. 2 (Bill of Rights), of the Constitution, as tending to violate the obligation of contracts."

Section[s] 3609 [and 4407 (c)] 36 O. S. 1957, became effective on July 1, 1957, and [were] was not in force at the time the insurance contracts (policies) were (issued) made. The corresponding former section was 36 O. S. 1951, Sec. 213, and was in force at the time of the issuance of the insurance policies herein, and in part (pertinent to the issues herein) provided:

"Sec. 213. Statements in Application Deemed Representations and Not Warranties Exceptions Application Not Part of Policy Unless Attached. In any claim arising under a policy which has been issued in this State by any life insurance company, without previous medical examination or without the knowledge and consent of the insured, or in case said insured is a minor, without the consent of the parent, guardian, or other person having legal custody of said minor, the statements made in the application shall, in the absence of fraud, be deemed representations and not warranties: Provided, However, that the company shall not be debarred from proving as a defense to such claim that said statements are wilfully false, fraudulent or misleading: * * *"

And in considering Section 213, supra, we must also consider in connection therewith 36 O. S. 1951, Sec. 820 (Riley v. Cordell, 200 Okl. 390, 194 P. 2d 857), which statute applied to the contracts herein and provided:

"Sec. 820. Statements in Application. The falsity of any statement in the application for any policy covered by this Act shall not bar the right to recover thereunder unless such false statement was made with actual intent to deceive and unless it materially affected

either the acceptance of the risk or the hazard assumed by the insurer. [Laws 1947, p. 284, Sec. 20]."

Thus the law as reflected by these statutes (Secs. 213 and 820, supra) clearly required proof of actual intent to deceive, or deceit or fraud to avoid recovery under the insurance policies. There was no such showing in the instant case. In Continental Casualty Co. v. Owen, 38 Okl. 107, 131 P. 1084, this court said:

"* * * Indeed, it may be said that it is well settled that to avoid a policy for misrepresentation, the false statement must have been made wilfully and with intent to deceive, and must have been relied on by the insurer. * * *"

There are other Oklahoma cases holding that under the law as it existed at the time the policies herein were issued that representations made by the insured must be proved to be wilfully false, fraudulent, misleading and with intent to deceive to enable the insurer to avoid the insurance contract. New York Life Ins. Co. v. Stagg, 95 Okl. 252, 219 P. 362; Lincoln Health & Accident Ins. Co. v. Coslow, 158 Okl. 169, 12 P. 2d 875, and Atlas Life Ins. Co. v. Eastman, (Okl.) 320 P. 2d 397, and cited cases.

Instruction no. 6 reads as follows:

"INSTRUCTION No. 6

"You are instructed that all statements and descriptions in any application for an insurance policy or in negotiations therefor by and in behalf of the insured shall be deemed to be representations and not warranties. In this connection, a representation is any direct and positive affirmation of a matter of fact as distinguished from a mere matter of opinion or judgment, made by the insured or in his behalf and designed to induce the action of the insurer and actually relied upon by the insurer in issuing the policy.

"Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery

under the policy unless the statements are fraudulent. In this connection, in order that you find by a preponderance of the evidence that the statement was fraudulent, you must find that plaintiff made a material misrepresentation or omitted or concealed material facts, that it was false or the omission was meant to conceal, that when plaintiff made it, he knew it was false or meant to conceal or made it recklessly, that plaintiff made it or omitted it was the intention that it be acted upon by the defendant, that the defendant acted in reliance thereon, and that the defendant in good faith would not have issued the policy if the true facts had been known to the defendant.

"D excepts and allowed.

"(s) Paul A. Walker, Jr."

Thus the trial court's instruction No. 6 setting for the requirement of proof of fraud or intent to deceive in statements made to avoid the policy correctly stated the law applicable in such cases as it existed when the policies were issued, and the refusal to give defendant's requested instructions and the giving of instruction no. 6 was not error, as the instructions when considered as a whole fairly stated the issues to the jury.

The defendant cites a number of cases from other jurisdictions tending to support their theory as applied to the statutes as they now exist, but we decline to pass upon the subsequently enacted statutes and hold without discussion that the contention of defendant that the law in this case is one of procedure rather than substantive is without merit.

The judgment is affirmed.

CONCUR: Williams, V.C.J., and Halley, Blackbird, Irwin & Berry, JJ.

CONCUR IN RESULT: Jackson, J.

DISSENT: Davison, C.J. and Wolch, J.

Order of the Supreme Court of the State of Oklahoma Correcting Its Opinion, September 19, 1960

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

No. 38,731

ALLIED RESERVE LIFE INSURANCE COMPANY, a corporation, *Plaintiff in Error,*

v.

HUBERT MORGAN CRAGG, JR., a minor by and through HUBERT MORGAN CRAGG, his Father and Next Friend, *Defendant in Error.*

ORDER

IT IS HEREBY ORDERED THAT the opinion in the above styled cause be corrected in the following manner:

The first sentence in paragraph two on page four of the opinion should be changed to read as follows: "Section 3609, 36 O.S. 1957, became effective on July 1, 1957, and was not in force at the time the insurance contracts (policies) were (issued) made."

In paragraph 5 of page 4, after the quoting of Sec. 820, the following should be deleted: "Laws 1947, p. 284, Sec. 20."

DONE BY ORDER OF THE COURT IN CONFERENCE this 19th day of September, 1960.

/s/ BEN T. WILLIAMS
Acting Chief Justice

Order of the Supreme Court of Oklahoma Denying Petition for Rehearing, September 21, 1960

38731—Allied Reserve Life Ins. Co. v. Hubert Morgan Cragg, Jr., etc. Petition for rehearing denied.

Order of the Supreme Court of the State of Oklahoma Granting Extension of Time to File Application for Leave to File Second Petition for Rehearing, September 27, 1960

38731—Allied Reserve Life Ins. Co. v. Hubert Morgan Cragg, Jr., etc. Plaintiff granted until Oct. 12, 1960, to file application for leave to file second petition for rehearing.

Order of the Supreme Court of the State of Oklahoma Denying Application for Leave to File Second Petition for Rehearing, April 11, 1961

38731—Allied Reserve Life Ins. Co. v. Hubert Morgan Cragg, Jr., etc. Application for leave to file 2nd petition for rehearing denied.